Supreme Court U.S.
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IN THE

Supreme Court of the United States

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (the "FSIA") provides among other things that a judgment-creditor of a foreign state or its instrumentality can execute only on the sovereign-debtor's property located "in the United States," 28 U.S.C. §§ 1609, 1610(a), 1610(b). This case presents the following questions related to this important limitation:

1. Is a fee payable by a foreign state to its wholly owned instrumentality considered to be "property in the United States," and therefore subject to execution under the FSIA to satisfy a U.S. judgment against the instrumentality, when the obligation (a) arises only in the future, (b) arises as a matter of the law of the foreign state, (c) is payable entirely within such state, and when the state has not waived its immunity from suit and execution or engaged in any conduct that would eliminate such immunity?

2. Whether the Second Circuit erred, in conflict with the Fifth Circuit and lower courts elsewhere, in resolving this question in contravention of the FSIA's statutory limitation that property belonging to a sovereign instrumentality be "in the United States" before it may be subjected to execution?

PARTIES TO THE PROCEEDING

The parties to the proceedings are listed in the caption of the decision of the U.S. Court of Appeals for the Second Circuit. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara states that it is an Indonesian oil and gas enterprise, wholly owned by (but a separate juridical entity from) the Government of the Republic of Indonesia.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at *Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), and appears in the Appendix of this Petition ("Pet. App.") at 1a-34a. The orders of the court of appeals denying timely petitions for rehearing are unreported, and appear at Pet. App. 41a-42a, 43a-44a. The judgment and mandate of the court of appeals

appears at Pet. App. 45a-46a. The order of the United States District Court for the Southern District of New York is unreported and appears at Pet. App. 35a-40a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision affirming the district court's denial in part and grant in part of orders to show cause for writs of execution on December 10, 2002. Pertamina and non-party with interest Ministry of Finance of the Republic of Indonesia (the "Ministry") each submitted timely petitions for rehearing pursuant to Fed. R. App. P. 40 on December 24, 2002. The petitions for rehearing were denied by orders of the court of appeals entered January 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976, as amended ("FSIA"), provides in pertinent part:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property ***in the United States*** of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609 (emphasis added).

> [A]ny property ***in the United States*** of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if [the instrumentality waived sovereign immunity or otherwise is not entitled to sovereign immunity.]

28 U.S.C. § 1610(b) (emphasis added).

STATEMENT OF THE CASE

This case concerns efforts to garnish the Republic of Indonesia's property—revenues from the sale of its natural gas—in satisfaction of a judgment against Pertamina—a juridically separate instrumentality of the Republic. Although the decision below correctly denied these efforts in most respects, it allowed the garnishment of a portion of those funds equal to a separate fee Pertamina eventually receives from the Indonesian Government, in Indonesia. The latter ruling was erroneous, as Pertamina's future right to a fee in Indonesia is not "property in the United States" as the FSIA requires.

The Court should review this case to explain and to apply the "in the United States" limitation of the FSIA. Doing so would allow the Court to clarify how this important situs limitation applies to debts, bank accounts, and other common forms of intangible property such as those at issue here—a recurring issue under the FSIA which the lower courts have not addressed in a consistent manner. This issue particularly warrants clarification because Congress has noted "the importance of developing a uniform body of law [under the FSIA]," H.R. Rep. No. 94-1487 at 32, *reprinted at* 1976 U.S.C.C.A.N. 6604, 6631. Such uniformity is important not only because of "the potential sensitivity of actions against foreign states," *id.*, but to preserve United States money center banks as a locus of global financial activity, which depends on careful delineation of separate ownership interests and, as to sovereigns, faithful recognition of the separation between governments and their agencies and instrumentalities. *See id.* at 28, 29-30, *reprinted in* 1976 U.S.C.C.A.N. at 6627-30.

This case also warrants review by the Court because of the significant questions of international comity and foreign affairs it implicates. The funds on which the Second Circuit decision would permit execution are owned by the Republic

of Indonesia—which has no liability for the judgment and has not waived its sovereign immunity—and constitute a principal source of that nation's foreign exchange. Allowing execution on these revenues would hinder the Republic's ability to meet sovereign debt repayment obligations and economic reform commitments imposed by the International Monetary Fund ("IMF"), or to achieve other domestic and international goals important not just to Indonesia but to others as well, including the United States, at a time when our Nation's relations with this important country are at a significant juncture.

The Underlying Judgment

On February 22, 2002, the U.S. District Court for the Southern District of New York granted on an *ex parte* basis motions seeking permission under 28 U.S.C. § 1610(c) to serve restraining notices on 15 bank garnishees and orders to show cause for writs of execution on Pertamina funds allegedly held by them. *Karaha Bodas Co.*, 313 F.3d at 77-78, Pet. App. 7a. Pursuant to those notices, nearly a half a billion dollars have been restrained in accounts in New York, notwithstanding that both the district court and the court of appeals have held that a substantial portion of those funds belongs to the Government of Indonesia and are immune from execution.

The process issued in New York arose as a result of the registration there of a judgment issued by the U.S. District Court for the Southern District of Texas. The Texas judgment, in the amount of $261 million plus interest of 4% per year from January 1, 2001, granted recognition to a foreign arbitration award obtained against Pertamina with respect to contracts entered into with a Cayman Islands company (Respondent here) that called for performance in Indonesia and that were governed by Indonesian law. The Texas court exercised jurisdiction pursuant to Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 ff., implementing the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and consistent with the FSIA, 28 U.S.C. §§ 1330 and 1605(a)(6). The Texas judgment is on appeal to the Fifth Circuit without a supersedeas bond (which would have been impracticable). The Texas court had denied a stay of enforcement pending appeal and authorized registration of the judgment in New York pursuant to 28 U.S.C. §§ 1610(c) and 1963. *See* 313 F.3d at 75-77, Pet. App. 2a-6a.

The only New York garnishees holding funds even arguably relating to Pertamina were Bank of America and Bank of New York. 313 F.3d at 78, Pet. App. 7a; Pet. App. 36a-40a. Specifically, portions of funds held in various trust accounts administered by these banks are listed under Pertamina's name.

Pertamina sought discharge of the writ of execution on the ground that the restrained funds belong to the Government of Indonesia itself, and not to Pertamina. The Ministry as a non-party with interest also sought to quash the restraint, asserting the Government's property rights in the funds sought to be garnished. The district court ultimately ruled on the ownership of funds in 15 specific trust accounts at Bank of America, which contained the majority of the funds then under restraint.[1] Pet. App. 37a-39a; 313 F.3d at 79-80, Pet. App. 10a-11a.

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[1] The district court reserved decision as to the remaining trusts, as to which the court found the record to be incomplete, while certifying its order allowing attachment of funds in the 15 trusts for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 39a-40a. An order allowing execution as to specifically identified property is final and appealable under the collateral order doctrine. *See, e.g., Giove v. Stanko*, 49 F.3d 1338, 1341-42 (8th Cir. 1995). In the event, the Second Circuit accepted jurisdiction under Section 1292(b) and did not consider its jurisdiction under the collateral order doctrine. 313 F.3d at 80-81, Pet. App. 11a-13a.

The Funds At Issue

The 15 trust accounts at issue contain revenues from the sale of Indonesian liquefied natural gas ("LNG") extracted, produced, and sold pursuant to arrangements known as Production Sharing Contracts ("PSCs"). Pertamina has entered into PSCs—on behalf of the Indonesian Government—with various private contractors, who are generally responsible for exploration and production efforts. PSCs are governed by Indonesian law and are performed in Indonesia. The purchasers of LNG—none of which are in the United States or are U.S. entities—make payment to Bank of America as trustee, which pays debt service and various other production expenses, and distributes the remainder to the PSC contractors in specified amounts known as "Production Sharing Percentages." 313 F.3d at 78-79, Pet. App. 7a-9a.

Pertamina is denominated on Bank of America's books as receiving a Production Sharing Percentage. 313 F.3d at 79, Pet. App. 9a; Pet. App. 37a-38a. However, as the district court and court of appeals correctly found, that Production Sharing Percentage does not actually belong to Pertamina as a matter of governing Indonesian law. 313 F.3d at 90-92, Pet. App. 30a-33a; Pet. App. 38a-39a. Rather, Pertamina administers the PSC arrangements and the LNG export program on behalf of the true owner and beneficiary of the resources, the Indonesian Government. 313 F.3d at 78-79, 88-92, Pet. App. 7a-10a, 26a-33a.[2] The court of appeals likened Pertamina's role vis-à-vis the restrained funds to that

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[2] Pursuant to Indonesian legislation adopted on November 23, 2001, Law No. 22 of 2001, these responsibilities have been shifted to a Government agency separate from Pertamina, referred to in the legislation as the Implementing Body and now known as BP Migas. When the provisions of this new law are fully effective, Pertamina will have no right to the fee that is the subject of this Petition, but that does not affect the disposition of the funds currently restrained in New York. *See* 313 F.2d at 75-76, Pet. App. 3a.

of a "trustee," which does not itself have an "ownership interest" capable of being attached by a creditor. 313 F.3d at 92, Pet. App. 33a-34a; *see* 313 F.3d at 85-87, Pet. App. 21a-25a.

This principle reflects long-standing Indonesian law, under which the Government holds the nation's oil and natural gas for the benefit of the Indonesian people, as it does the revenues from the disposition of these resources.

> "The earth and the waters and the natural riches contained therein are the fundamentals of the people's prosperity. Therefore they should be controlled by the State and be made use of for the greatest possible prosperity of the people." Elucidation of the Indonesian Const., Art 33. Other Indonesian laws evince similar concerns. *See* Law Substituting Gov't Regulation No. 44 Year 1960; Law of the Republic of Indonesia Number 8 Year 1971.

313 F.3d at 87, Pet. App. 24a-25a. *See also* Elucidation to Law No. 44 of 1960 ("The State Enterprises in implementing their mining authority cannot be said to carry out mining operations as owner of the relative mining areas . . . . ***Only such compensations for services rendered*** in the form of exploration and/or exploitation and/or refining and processing or sale operations become property of the State Enterprises.") (emphasis added).

The district court's and court of appeals' rulings focused particularly on Indonesia's Government Regulation No. 41 of 1982. Article 5(2) of that regulation provides that the amount "received by Pertamina according to each Production Sharing Contract"—other than what it receives from the Government as a fee for its services rendered to the Government—"***shall be the Government's portion.***" 313 F.3d at 84, Pet. App. 18a; Pet. App. 38a-39a (Government Regulation No. 41) (emphasis added). The lower courts found that this provision gives the Government a ***property right*** in the specific funds

restrained here. 313 F.3d at 90-92, Pet. App. 30a-32a; Pet. App. 39a. On this basis, the courts rejected the judgment creditor's efforts to attach the "Pertamina" Production Sharing Percentage.

The Court of Appeals' Erroneous Ruling As To The "Retention Fee"

The district court and court of appeals permitted execution against an amount equal to the fee Pertamina eventually receives from the Indonesian Government for its administrative services, which Government Regulation No. 41 of 1982 denominates the "Retention Fee," 313 F.3d at 80, 84, 92, Pet. App. 11a, 18a, 34a. However, Pertamina has no enforceable right ***in New York*** as against the Government to that fee or to any portion of the funds in the 15 accounts.

Pertamina demonstrated to the courts below, without contradiction, that the same Indonesian laws and regulations that create Pertamina's right to a Retention Fee also provide that any such right arises only ***in Indonesia***. Pertamina as a matter of Indonesian law receives the fee in a separate transaction in Indonesia, after the entire Production Sharing Percentage denominated in its name is transmitted to the Government's account in Indonesia. Pertamina has no rights to the specific funds located in New York, which must be transmitted to the Government's account in full. *See* 313 F.3d at 89, Pet. App. 28a.

Indeed, dating back to at least 1967, Pertamina and its predecessors have been required to remit ***all*** proceeds to the State before they could be paid their fees as to Contracts of Work (the predecessors to the PSCs here). *See* Joint Decree No. 02/KB/M/Pertamb/1967, Articles 1-2 (making clear "***that the whole income amount*** resulting from Work Contract [must be] ***received by the State.***") (emphasis added). Only "afterwards" are such things as fees to be paid, "treated as expenses based on general Government policy." *Id.* (General Clarification to Joint Decree).

The requirement to pay all funds to the Government was given greater urgency in 1974, when, as a result of a severe financial crisis, Pertamina failed to do so. To insure against such lapses in the future, Presidential Instruction No. 12 of 1975 was issued, which expressly stated that all such revenues would be paid directly to the Ministry's account at Bank Indonesia (Indonesia's central bank). *See* Declaration of Sudargo Gautama ¶¶ 29-31 (March 20, 2002) (cited at 313 F.3d at 87, Pet. App. 24a, as "describing the regulation of PSC revenues").

To implement this instruction—and pursuant to the authority of Article 33 of Pertamina's then organic statute, Law No. 8 of 1971—the Ministry established specific procedures whereby the full amount of the "Pertamina" share under the PSCs must be remitted to the Ministry's account at Bank Indonesia, before any fee owed to Pertamina is calculated and paid by the Bank. The Minister's written instruction of 1976 states this clearly: "the rights of Pertamina will be disbursed from the foreign exchange account of the Department of Finance ***after*** the results of Pertamina exports [through] production sharing contracts and the deposits by the contactors ***have entered the foreign exchange account of the Department of Finance***." Minister of Finance Directive B-752/MK/IV/12/1976 (Dec. 16, 1976) (emphasis added). The Minister issued a comparable written instruction in 1984, this time to implement Regulation No. 41 of 1982. Once again, the instruction clarifies that Pertamina's Retention Fee is payable only from the Ministry's foreign exchange account in Jakarta and that, once the funds are received in that account, Bank Indonesia is to pay Pertamina an amount equal to "5/65 of LNG/Gas revenues from Production Sharing Contract respectively from every revenue of Pertamina export proceeds and payments from Contractors in the framework of Production Sharing Contracts." Minister of Finance Directive S-384/MK.012/1984. *See* 313 F.3d at 89, Pet. App. 28a ("undisputed evidence that [Pertamina] has

consistently transferred all of its Production Sharing Percentage to the Republic of Indonesia's account") (citing Declaration of Sahala L. Gaol).

Thus, Bank Indonesia calculates and initiates payment of Pertamina's fee after the Bank has confirmed receipt of the entire Production Sharing Percentage in the Ministry's account. Declaration of Sahala L. Gaol ¶ 9 (March 22, 2002). This separate transaction is effected entirely within the walls of Bank Indonesia in Jakarta. *Id.*; *see* Supplemental Declaration of Sahala L. Gaol ¶ 4 (April 4, 2002). Pertamina does not and has no right to withhold its Retention Fee from the "Pertamina" share distributed by Bank of America. *See* 313 F.3d at 89, 91-92 & n.19, Pet. App. 27a-28a, 32a-33a. Nor, because money is fungible, does Pertamina's fee necessarily come out of the particular funds that flow through the New York trust accounts.

The court of appeals did not deny these principles of Indonesian law, and indeed acknowledged that Pertamina "may be under an obligation" to transfer the restrained funds in their entirety to the Government. 313 F.3d at 92, Pet. App. 34a. Nevertheless, the court permitted execution on the Retention Fee, as did the district court, with an exceedingly brief analysis, the predicate for which was N.Y. C.P.L.R. § 5201(b). *See* 313 F.3d at 83, 92, Pet. App. 17a, 34a. The court of appeals held that the Retention Fee is "property within Pertamina's control" and therefore subject to execution, without ever discussing the "in the United States" limitation of the FSIA extensively briefed by the parties. 313 F.3d at 92, Pet. App. 34a. Both Pertamina and the Ministry petitioned the panel for rehearing based on this situs issue, but those petitions were denied without comment. Pet. App. 41a-44a.

The district court had stayed its own decision, and deferred ruling on other trusts, pending the appeal to the Second Circuit. Pet. App. 40a. The Second Circuit modified the stay

during the pendency of the appeal, ordering the release of funds in the 15 trusts in excess of the amount of the judgment. 313 F.3d at 80, Pet. App. at 12a. In its decision on appeal, notwithstanding the holding that "most . . . of the funds belong to Indonesia," 313 F.3d at 75, Pet. App. 2a, the Second Circuit "direct[ed] the district court, in the course of [its further] proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined," 313 F.3d at 93, Pet. App. 34a. As a result, nearly half a billion dollars remain restrained—roughly $285 million in the 15 trusts, and roughly $200 million in the remaining unadjudicated trusts.

REASONS FOR GRANTING THE PETITION

The Court should grant review to clarify the application of the FSIA's "property in the United States" limitation to intangible property, such as that at issue here, a subject that has been treated inconsistently and with some confusion by the lower courts. Doing so would contribute to the uniformity contemplated by the FSIA, protect the efficacy and reliability of this country as a world financial center, and correct a serious error that has significant adverse consequences for a sovereign that has strategic significance to the United States.

I. THE DECISION BELOW IS ERRONEOUS AND REFLECTS CONFUSION IN THE LOWER COURTS OVER APPLICATION OF THE "IN THE UNITED STATES" LIMITATION OF THE FSIA TO EXECUTION ON INTANGIBLE PROPERTY

As an agency or instrumentality of a foreign state within the meaning of the FSIA, 28 U.S.C. § 1603(a), Pertamina is entitled to its protections. *See* 313 F.3d at 75-76, Pet. App. 3a. The FSIA imposes "two prongs of analysis" to determine

whether particular sovereign property is amenable to execution, assuming that the sovereign has already waived sovereign immunity: (i) the property must be located "in the United States," and (ii) the property must be used for a commercial activity in the United States (or, in the case of a state instrumentality, the instrumentality must engage in commercial activity in the United States). *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 265 (5th Cir. 2002) (on rehearing); 28 U.S.C § 1610(a)-(b). Both prongs must be satisfied for a U.S. court to have jurisdiction to permit execution. *Id.*

This Court has discussed the commercial activity requirements of the FSIA at length in the context of the jurisdictional provisions of Sections 1604-1605 of the statute respecting immunity from suit. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (reviewing what actions are "based on a commercial activity" within the meaning of 28 U.S.C. § 1605(a)(2)). However, the Court has never decided a case involving the execution provisions of the FSIA, Sections 1609–1611.[3] It has therefore never addressed the threshold "in the United States" requirement for execution on a foreign state or state instrumentality's property under Section 1610, much less clarified how that requirement applies to intangible property rights that lack a physical situs. The Court's lack of guidance on this issue, and the inconsistent treatment of this recurring issue by the lower courts, has led to a confused state of the law, in an area where Congress has explicitly cited "the

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[3] In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983) ("*Bancec*"), the Court cited the legislative history of Section 1610(b) in the context of the presumption of independent status of "duly created instrumentalities of a foreign state," which has its counterpart here in Pertamina's posture vis-à-vis the state itself. There was no allegation below, nor could there have been, that Pertamina is not separate from the Republic of Indonesia under the standards set forth in *Bancec*.

importance of developing a uniform body of law." H.R. Rep. No. 94-1487 at 32, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628.

To the extent that courts have grappled with the "in the United States" provision of the FSIA, they have recognized that it is more exacting than the traditional (and outdated) common law situs position assumed in *Harris v. Balk*, 198 U.S. 215 (1905). That approach deemed intangible property to reside wherever the debtor's debtor can be found.[4] By contrast, in *Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113 (S.D.N.Y. 1996), the court found a Philippine sovereign-debtor's bank accounts to be outside the United States and thereby not subject to attachment, even though the garnishee bank was located in and subject to suit in New York. The court in *Fidelity Partners* undertook a fact-intensive analysis that demonstrated the substantial connection between the accounts and the Philippines. *Id.* at 1118. The court particularly noted the need to apply strictly the "in the United States" requirement "to preserve the limited reach of the FSIA's exceptions to immunity." *Id.* at 1119. Judge Schwartz's thoughtful reasoning remains the most extensive treatment of the FSIA's situs limitation, and therefore bears quoting:

> Thus, it appears necessary under the FSIA to ascribe a location, or situs, to the PNB accounts. In other contexts, it has been recognized that the situs of intangible assets "is in truth a legal fiction," but that "there are

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[4] *Harris v. Balk* has been overruled on the jurisdictional point it actually addressed, *see Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977). In any event, that situs rule would not support the judgment of the court of appeals. The Government of Indonesia is not "present" in New York in any relevant sense because it is not subject to jurisdiction as a garnishee under the FSIA, *see* 28 U.S.C. § 1605(a), and, to take it a step further, Pertamina (and therefore its judgment creditor, which stands in Pertamina's shoes) could not sue the Government in New York to collect the Retention Fee.

> times when justice or convenience requires that a legal situs be ascribed to them." *Severnoe Secs. Corp. v. London & Lancashire Inc.*, 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931) (Cardozo, J.). This case presents such a time. Whether the PNB accounts are characterized as "debts" of PNB or as "assets" of Philguarantee, a determination of the situs of the accounts is necessary to preserve the limited reach of the FSIA's exceptions to immunity. This is especially important in the instant case, where Fidelity seeks to levy upon a foreign state's bank deposits maintained at a bank headquartered in its own country. An analysis of Philguarantee's banking relationship with PNB compels the conclusion that the situs of Philguarantee's PNB accounts is in Manila, not "in the United States" as Section 1610(b) of the FSIA requires.

Id. at 1119.

Another district court decision, *Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1340 (S.D. Fla.), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999), employed a similar totality-of-the-circumstances analysis. In that case, the court held that payments to a Cuban entity through Canadian bank accounts nonetheless were "in the United States." The court did not rest on the fact that the garnishee was located in the United States. Rather, the court relied on specific facts regarding the substance and origin of the payments in question, which showed a connection with the United States much more significant than anything present here. The payments represented proceeds from telecommunication services rendered by United States companies to customers who were located in the United States. These services and proceeds owed their existence to United States government regulations, and the funds had no connection with Canada other than their placement in accounts there for payment. The court found particularly significant that "the telecommunications carriers get the funds through which they make their payments from

customers in the United States." *Id.* Indeed, the whole purpose of the arrangements at issue was to remit a share of payments received for services rendered to U.S. customers for telecommunications between the U.S. and Cuba. *See id.* at 1325. In such circumstances, the court disregarded that the funds "ultimately are exchanged in Canadian bank accounts," *id.* at 1340, and that "the connection service may occur somewhere in the international waters between the United States and Cuba," *id.* at 1341.

However, other courts—and all the courts of appeals that have been presented with FSIA situs issues—have accorded the "in the United States" prong substantially less weight. These courts have either purposefully ignored that limitation altogether, as the Second Circuit did here, or have simply acknowledged the limitation without making any effort actually to apply it. For instance, in *Connecticut Bank*, 309 F.3d at 240, the Fifth Circuit vacated the dismissal of a creditor's attempt to garnish oil royalties and tax obligations owed to the Republic of the Congo in the Congo and arising from a joint venture in the Congo. The majority opinion did not address the obvious situs issue presented in that case, and indeed indicated on rehearing that it was deliberately avoiding (and not deciding) the question. *See id.* at 265. A concurring opinion mentioned the "in the United States" issue in passing and, without any apparent analysis, reflexively equated it with the question of the situs of the debtor's debtor. *Id.* at 261-62 ("Under the undisputed facts, the property executed upon—the garnishees' intangible obligations to pay royalties—are in the United States, as required by FSIA § 1610(a). The garnishees are oil companies headquartered in Texas. The situs of a debt is the situs of the debtor in Texas."). Such confusion on this important principle of sovereign immunity warrants review by this Court.

The situs limitation also cannot be ignored based on a contractual waiver of immunity.[5] Section 1610 governs execution or attachment against a sovereign entity, ***even where that entity has waived sovereign immunity***, as is shown by the plain language of Sections 1610(a)-(c), the relevant portions of which are as follows (with emphasis added):

> (a) The property ***in the United States*** of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . ***if***—
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> (1) the foreign state ***has waived its immunity*** . . . either explicitly or implicitly.
>
> . . . .
>
> (b) [A]ny property ***in the United States*** of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution . . . ***if***—
>
> (1) the agency or instrumentality ***has waived its immunity*** . . . either explicitly or implicitly.

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[5] Here, the district court dispensed with an analysis of the FSIA by addressing waivers of immunity in the contracts that were the subject of the arbitration, on which the judgment rested. "Pertamina waived its rights under the sovereign immunity concept and waived those rights with respect to the arbitration and waived those rights with respect to recovery on any assets. Despite that, there has been, out of what I think is an abundance of caution, an attempt to comply with the Foreign Sovereign Immunities Act in respect to laying the basis for recovery on this judgment." (Transcript of Proceedings, April 5, 2002, at 78:14-20). Based on those contractual provisions, the court of appeals concluded that "Pertamina has thus waived its sovereign immunity from attachment in United States courts," and did not otherwise treat the FSIA. 313 F.3d at 83 & n.12, Pet. App. at 16a. It considered jurisdiction to have "been established pursuant to 28 U.S.C. § 1610(b)(1) by the contractual waiver of immunity." 313 F.3d at 85, Pet. App. 20a.

. . . .

> (c) ***No attachment or execution referred to in subsections (a) and (b)*** of this section ***shall be permitted*** until the court has ordered ***such*** attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

A waiver of immunity therefore serves only to trigger a judgment-creditor's right to execute under Section 1610, which by its terms extends only to "property in the United States," 28 U.S.C. § 1610(b). "The property in question must be used for a commercial activity in the United States. ***If so***, attachment in aid of execution, and execution, . . . would be permitted in any of the circumstances set forth in paragraphs (1)-(5) of section 1610(a)." H.R. Rep. No. 94-1487 at 28, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 (emphasis added). As seen above, one of those circumstances is where the foreign state has waived its immunity. 28 U.S.C. § 1610(a)(1). Section 1610(b) similarly allows execution "where the agency or instrumentality has waived its immunity from execution," H.R. Rep. No. 94-1487 at 29, *reprinted in* 1976 U.S.C.C.A.N. at 6628, but there is no relaxation of the "in the United States" requirement. *See Connecticut Bank*, 309 F.3d at 247 ("Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria," *i.e.*, the "in the United States" limitation and the commercial activity limitation); *LNC Investments, Inc. v. The Republic of Nicaragua*, No. 96 Civ. 6360, 2000 WL 745550, **3-4 (S.D.N.Y. June 8, 2000) (holding that provisions of Section 1610 apply even where sovereign entity "gives a blanket waiver of immunity from attachment and execution," and that "[t]he Court would have to ignore the clear language of §§ 1609 and 1610 to find as LNC argues [*i.e.*, that the sovereign's waiver negates the protections of Section

1610]."); *Third Avenue Associates v. Permanent Mission of the Republic of Zaire*, 787 F. Supp. 389, 393 (S.D.N.Y. 1992) (the waiver exception in Section 1610(a) "apparently extends only to property 'used for a commercial activity.'"); *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) ("the statute thus sets forth a two-step analysis relevant here for determining immunity: the foreign state must have waived its immunity, and the property attached must be used for a commercial purpose.").[6]

This Court should grant certiorari to review the Second Circuit's decision and clarify the approach that the lower courts should take on the "in the United States" issue. The effect of the Second Circuit's ruling is to place "in the United States" a Retention Fee that is paid and payable only in Indonesia, from the Indonesian Government, out of funds located in Indonesia, based on contracts performed in Indonesia, and under Indonesian law, despite the fact that Pertamina could neither demand payment of the fee from the Government in the United States nor sue here to compel its payment because of the Republic of Indonesia's immunity under the FSIA. The court of appeals' approach would permit wholesale incursions by federal courts into the internal affairs of foreign states and seizures of state property based solely on the existence of obligations states owe to state instrumentalities, that are created by their own law and

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[6] Indeed, the Texas Court whose judgment is being enforced here has held that the procedural limitations of Section 1610(c) apply regardless of Pertamina's "waiver." *Karaha Bodas Company L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. H01-634, Memorandum and Order at 3 (S.D. Tex. March 7, 2002) ("Pertamina's waiver of immunity does not waive the procedural safeguards of § 1610(c)") (citing *LNC Investments* and *Ferrostaal Metals Corp. v. S. S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) (notwithstanding waiver of immunity by foreign state, requiring that attachment occur only by court order under Section 1610)).

performable only within their own territory. It would also illogically expand opportunities for creditors to execute against U.S. dollar denominated assets owned by a foreign state, which are frequently more precious (as is the case here), even though the state's underlying obligation is payable in the state's local currency.

If foreign courts were to follow this same reasoning, a foreign creditor of a U.S. instrumentality such as the Export-Import Bank of the United States or the Overseas Private Investment Corporation would be allowed to seize property of the United States abroad if the United States owed any money to that instrumentality. Nor would it be much of a stretch for a foreign creditor of a State of the Union to seize United States property abroad because the federal government owes a debt to the state under, for example, United States law for Medicaid reimbursement. The likely reaction of the United States to such proceedings suggests the similar reaction of foreign states to the disregard of the situs requirement of the FSIA exemplified by the decision below.

Indeed, if the "in the United States" limitation is to be disregarded simply because Pertamina is a party to commercial contracts with third parties governed by New York law and involving a financial institution in New York, U.S. banks would lose business to London, Frankfurt, and Tokyo. Foreign parties often seek financing from U.S. money center banks, but they surely do not expect that separate legal undertakings under foreign law will thereby be transformed by U.S. law. If that were to happen, they might well seek financing elsewhere. Sovereigns, particularly in the developing world, likewise finance development projects in the U.S. through juridically distinct instrumentalities, but doing so should not be held to modify the laws establishing and regulating those instrumentalities. That is the effect of the

Second Circuit's decision, yet this is just what Congress directed the courts to guard against in FSIA cases.

> . . . The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. . .
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> . . . .
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> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another unrelated agency or instrumentality . . . . There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

H.R. Rep. No. 94-1487 at 28, 29-30, *reprinted in* 1976 U.S.C.C.A.N. at 6627-29 (citations omitted). The writ should be granted to effectuate these purposes.

II. REVIEW BY THIS COURT IS WARRANTED BECAUSE OF INTERNATIONAL COMITY AND FOREIGN POLICY CONCERNS

A. The Inherent Importance Of Resolving Foreign Sovereign Immunity Issues

This Court has a particular interest in foreign sovereign immunity issues. Indeed, Congress has underscored the importance of resolving interpretational questions under the FSIA because "of the potential sensitivity of actions against foreign states." H.R. Rep. No. 94-1487 at 32, *reprinted in* 1976 U.S.C.C.A.N. 6631. Moreover, actions directly involving foreign nations warrant special attention, both to foster goodwill among nations and to ensure, as a matter of comity, that the United States is afforded reciprocal treatment when it

is a party in foreign courts. *See generally Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 555 (1987) ("Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."). These concerns are especially compelling in cases such as this, which involve execution or attachment of a foreign sovereign's assets. H.R. Rep. No. 94-1487 at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626 (noting that "attachments can also give rise to serious friction in United States' foreign relations" and that "the enforcement of judgments against foreign state property remains a somewhat controversial subject in international law.").

Thus, the Court has regularly granted certiorari in cases raising questions under the FSIA. *Dead Sea Bromide Co., Ltd. v. Patrickson*, 122 S. Ct. 2658 (June 28, 2002) (Mem.) (granting certiorari to review scope of the definition of "agency or instrumentality" of a foreign state within the meaning of the FSIA); *Saudi Arabia*, 507 U.S. at 349; *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (reviewing whether Argentina's default on certain bonds was an act "in connection with a commercial activity" that had a "direct effect in the United States" within the meaning of 28 U.S.C. § 1605(a)(2) of the FSIA); *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989) (reviewing whether FSIA provides sole basis for jurisdiction in action against foreign sovereign); *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (reviewing whether for purposes of sovereign immunity "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (noting that foreign sovereign immunity is a matter of "grace and comity" among

nations) (reviewing whether FSIA's grant of jurisdiction to federal courts of cases governed by state-law rule of decision violated Article III). The Court should do so here as well.

B. The Direct Impact The Decision Below Will Have On The Republic Of Indonesia Warrants Review By This Court, As A Matter Of Comity

The substantial Indonesian interests at stake particularly justify this Court's review. The court of appeals has not permitted execution on just any asset. Rather, the funds at issue are proceeds from the disposition of Indonesia's patrimony, its natural gas resources, one of the principal sources of foreign exchange for the Indonesian economy, which are owed entirely to the Republic of Indonesia, which in turn owes no debt to the judgment-creditor and has not waived its sovereign immunity.[7] These funds are important to the nation and play a critical role in maintaining and improving the health of the fragile Indonesian economy.

As the Second Circuit noted in the decision below:

> Evidence submitted by the Ministry and Pertamina suggests that twenty percent of the Indonesian national budget derives from oil and natural gas revenues. *See* Decl. of Sahala L. Gaol ¶ 11. The funds are typically used to maintain Indonesia's foreign exchange reserves, and thus to service Indonesia's foreign debt. *Id.* ¶ 12.

313 F.3d at 79, Pet. App. 9a. The evidence on which the Court of Appeals relied outlined in detail the importance of

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[7] As discussed above, the funds at issue are owed entirely to the ***Government***, and are not Pertamina's assets. Moreover, even if it could be said that the funds belong to Pertamina, the Government is the beneficiary of nearly all of them. *See* 313 F.3d at 84, Pet. App. 19a. ("And even in Jakarta, Pertamina is not entitled to the entire Retention. Regulation 41, in Article 5(3), subjects the retention to a sixty percent tax. A second regulation, Government Regulation 73, then mandates payment of a fifty percent dividend to the government. In all, Pertamina actually receives one-fifth of the Retention.").

these funds to the Indonesian economy, and the impact of their loss on the national budget and the political stability of the country. Declaration of Sahala L. Gaol ¶ 18 (March 22, 2002).

First, sharing of LNG gas revenue with Indonesia's regions is important for preserving stability in important parts of that country like Aceh Province, in northern Sumatra, a significant gas-producing region where Islamic separatist movements have been active. *Id.* In budget year 2001, for example, more than $930 million in oil and gas revenues were delivered to the regions as their shares. *Id.* A reduction of gas revenues would reduce the funds available to these regions, adversely affecting their budgets and the services they can provide, which in turn could exacerbate the already existing political and religious instabilities in places like Aceh. *Id.*

Second, a loss of these revenues would directly impact Indonesia's foreign exchange reserves, to which the revenue from Pertamina's activities is critical. *Id.* ¶ 12. The PSC Contractors pay the Government in dollars, and such proceeds, as well as other dollar payments that Pertamina must make to the Government, represent a significant percentage of the foreign exchange reserves available to the Government each year. *Id.* Moreover, Pertamina's Retention is received in Indonesian rupiah, and not the U.S. dollar reserves the court of appeals permitted to be garnished. Among other things, these foreign exchange reserves are crucial to Indonesia's ability to service its enormous foreign debt. *Id.*

Third, a loss of this magnitude would also jeopardize crucial funding by the IMF and other international organizations—funding upon which Indonesia's economic stability and continued improvement are dependent—by causing it to violate important IMF-required benchmark reforms. For instance, in its Letter of Intent to the IMF ("IMF Letter of Intent"), Indonesia set explicit goals, including reducing its deficit from 3.7 to 2.5 percent of GDP. Decl. of Sahala L.

Gaol ¶ 21. Based on these goals, the IMF approved a $341 million loan disbursement on January 29, 2002. *Id.* A loss in the amount of this judgment, however, would increase the anticipated budget deficit to over 2.67%, thus jeopardizing the release of this critical disbursement. *Id.* ¶ 15. Similarly, under the IMF Letter of Intent, Indonesia's central bank, Bank Indonesia, has committed to maintain a minimum of net international reserves ("NIR") as a reserve requirement for purposes of central bank interventions. *Id.* ¶ 16. The NIR is composed, in part, of foreign exchange assets such as dollar revenues generated by oil and gas sales that are paid to Bank Indonesia's dollar reserve account. *Id.* Under the Government's undertakings with the IMF, any lien on oil and gas revenues payable to the Government would result in the exclusion of that revenue from the foreign exchange that the Republic can count towards its agreed foreign exchange reserve targets, with the result that execution upon these revenues could result in a violation of Indonesia's NIR commitments.

C. The Decision Below Implicates United States Foreign Policy Interests

Indonesia's loss of the substantial U.S. dollar reserves at issue here—and the various detrimental effects that loss would have on the Indonesian economy—would directly and negatively affect strong United States foreign policy interests. This independently warrants certiorari. *See, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 89 (2002) (noting that the Court granted certiorari in part because the case "implicates serious issues of foreign relations . . . .").

The United States has a strong interest in supporting Indonesia's economic recovery efforts. United States officials, in conjunction with the IMF, regularly meet with the Indonesian Government and actively participate in the development of the Government's economic program. *See, e.g.*, "U.S. Seeks

More Economic Support For Indonesia," *Jakarta Post*, November 14, 2002 ("[Randal K. Quarles, assistant secretary for international affairs,] told reporters that he was encouraged by the economic progress Indonesia had made these last 18 months . . . [and] said that on his return to Washington, he would be looking at ways on how the United States could help Indonesia move along the economic reform program, as worked out jointly with the International Monetary Fund (IMF)."); Press Release, U.S. State Department, August 2, 2002 (available at 2002 WL 25970320) (describing visit by Secretary of State Powell to Jakarta to meet with Indonesian President Megawati and the Coordinating Minister for Economics, Finance and Industry, and reproducing Secretary Powell's remarks, including "[t]he United States and Indonesia are pursuing a wide range of important issues in concert. We are expanding and deepening our bilateral ties and our economic cooperation . . . I commend the Minister for the positive steps that he and his economic team have taken toward economic and financial reform. Progress today, including the restoration and re-invigoration of relations with Indonesia's international lenders, has strengthened the currency and Indonesia's stock market.").

More generally, the United States has an unquestioned interest in participating in and supporting IMF foreign economic recovery procedures. *See Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 165 B.R. 379, 387 (S.D.N.Y. 1994), *aff'd*, 109 F.3d 850, 854-55 (2d Cir. 1997) (Congress considers international debt to be a problem that "threatens the safety and soundness of the international financial system, the stability of the international trading system, and the economic development of the debtor countries," and thus has determined that it is in the United States's interest to require debtor countries to engage in the IMF's debt resolution procedures). The Executive Branch has shown its support for such efforts through initiatives such as the Brady Plan, which

among other things calls for internal economic restructuring within debtor countries pursuant to IMF and World Bank programs. *Id.* at 388. *See also Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) ("With respect to private debt, support for the IMF resolution strategy is consistent with both the policy aims and best interests of the United States."). Indonesia's significant but fragile steps towards these important goals of economic recovery and debt repayment depend significantly on the hard currency earned by its natural gas revenues, which the lower courts would permit to be taken here.

Moreover, Indonesia is a key ally in the United States's global campaign against terrorism. Indeed, the nation was the target of perhaps the most prominent and deadly act of international terrorism since September 11—the nightclub bombings in the resort island of Bali in October 2002—which dealt a substantial blow to the Indonesian economy. The U.S. Government has expressed support for Indonesia's anti-terror efforts and a strong interest in helping Indonesia expand its law enforcement, military, counterterrorism, and other similar programs. *See* Press Release, U.S. State Department, August 2, 2002 (remarks of Secretary Powell at p. 5). As with all of Indonesia's various budgetary commitments, the LNG revenue at issue here is crucial to Indonesia's ability to meet these goals.

In sum, all these efforts by the Indonesian Government that are important to both Indonesia and the United States—towards economic recovery, debt repayment, counter-terrorism, and others—could be set back by the execution on hundreds of millions of precious U.S. dollars owed to the Government. These interests provide compelling grounds justifying the Court to grant certiorari and overturn the court of appeals' erroneous ruling permitting execution on a Re-tention Fee despite the fact that it is not "in the United States" for purposes of Sections 1609 and 1610 of the FSIA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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